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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TONY D. BLAUVELT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: CAN THE PROSECUTOR MISREPRESENT THE STANDARD OF INTENT UNDER (WILLFULNESS) REQUIRED BY TITLE 26 U.S.C. SECTION 7203 TO THE INDICTING GRAND JURY WITHOUT VIOLATION OF DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION? (UNBIASED GRAND JURY).

QUESTION 2: CAN THE PROSECUTOR USE PETITIONER'S HEARSAY GRAND JURY TESTIMONY AS EVIDENCE OF GUILT, IN ORDER TO OBTAIN A CONVICTION, WHERE SUCH HEARSAY IS NOT ADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE? [HEARSAY RULE AND RIGHT TO CONFRONTATION AND CROSS-EXAMINATION].

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To The Honorable Chief Justice Of The United States, And To The Associate Justices Of The United States Supreme Court:

Petitioner, Tony D. Blauvelt files this Petition for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the Trial Court's Judgment and sentence, and denied his request for rehearing and rehearing En Banc.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

The Opinion of the Court of Appeals has not been officially reported. A copy of that opinion is attached as Appendix A. A copy of the decision of the Court of Appeals denying Petitioner's Petition for Rehearing and Request for Rehearing En Banc is attached as Appendix B. A copy of the Judgment and Comitment Order of the Trial Court is attached is Appendix C. A copy of Petitioner's Motion for Stay of Issuance of the Mandate is attached as Appendix D.

JURISDICTION

The Judgment of the Court of Appeals was entered on the 30th day of November, 1984. A Petition for Rehearing and a Petition for Rehearing En Banc were denied on the 24th day of January, 1985. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Section 7203 of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

> Section 7203. Willful failure to file return, supply information, or pay tax.
>
> Any person required under this Title to pay any estimated tax or tax, or required by this Title or by regulation made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to

other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than one year, or both, together with the costs of prosecution.

SUMMARY OF THE CASE

Petitioner was convicted on three Counts of willfully failing to file Income Tax Returns for the taxable years of 1978, 1979 and 1980. (Counts 1, 3 and 5 of the Indictment). His Co-Defendant in the trial proceedings below, K. Janelle Blauvelt, has filed a contemporaneous Petition for review of her convictions with this Court. (Counts 2, 4 and 6 of the Indictment).

The case was tried to a jury before the U.S. District Court for the Northern District of Texas, Fort Worth Division, Honorable Eldon B. Mahon. Michael Louis Minns represented the Co-Defendant (Co-Petitioner here) K. Janelle Blauvelt while R. H. Wallace, Assistant U.S. Attorney, represented the Government.

Prior to trial, Petitioner attacked the propriety of his Indictment through a Motion to Dismiss on grounds of prosecutorial misconduct at the Grand Jury. (R.T., Page 2 and 3). The Motion was ultimately denied by the District Court which paved the way for the ensuing jury trial.

The third element of the failure to file statute became the main evidentiary focus of the trial. The prosecution, in its case-in-chief, heavily relied on the inferences of "substantial income" to support the finding of "willfulness" necessary to conviction. However, prior to the close of the Government's case, David Wells, a "Supervisory Revenue Officer—Group Manager", assigned to the Collection Division of the I.R.S., was called to the stand to

describe his previous experience with Petitioner. According to Wells he had brought a "summons proceeding" in order to obtain the requisite information to prepare and file Petitioner's 1976 Income Tax Return. (R.T. Page 139 and 140). The prosecution attempted, successfully, to weave a "fabric of guilt" from the threads of Wells' testimony describing the earlier summons case and the Court proceedings which ultimately resulted in enforcement of the Summons and Petitioner's late filing of the 1976 Income Tax Return in question.

At one point in Wells' testimony, the prosecutor was allowed to read the District Court's Order enforcing the summons and a related "Contempt Order". (R.T. Page 143, 147, 148 and 154). (Gov. Ex. 47 and 48). Despite Petitioner's strenuous objections the "Contempt Order" was "published" to the Jury panel. (R.T. Page 155).

Under cross-examination, Wells admitted he had destroyed the file on the Summons Enforcement Proceeding and conceded that Petitioner had had a previous history of late filing, even prior to the date of his first contact. (R.T. Page 160). While admitting that the I.R.S., under its normal procedure, would notify a taxpayer, by letter, of overdue returns, Wells was unable to state whether or not Petitioner had received such warnings "that the taxpayer would normally get". (R.T. Page 162). Wells "could not recall" making any threats against Petitioner nor the events surrounding the ultimate tender of the return for the taxable year of 1976 which Petitioner prepared. (R.T. Page 164).

No other Government witness' testimony bore on the issue of "willfulness". After the Government rested its case, and Petitioner's Motion for Judgment of Acquittal

was denied, Tony D. Blauvelt took the stand. Petitioner told a far different tale than that described by Wells. Petitioner had been self-employed for some period of time. Over the years, his income tax returns had gradually increased in complexity. (R.T. Page 236). David Wells, the Revenue Officer, first contacted him over the telephone, concerning his allegedly overdue tax return for the taxable year of 1976. Later Wells came to his home, confronted his wife, and served a summons, without further explanation. (R.T. Page 248).

After Blauvelt voluntarily prepared and filed his return for 1976, the Internal Revenue Service began an investigation into his returns for the taxable years of 1978, 1979, and 1980 (the indictment years). The investigating Agents informed him that the "primary focus" of their investigation was civil but that any records he provided them, or testimony he gave, could be used against him in a criminal proceeding. Based on this revelation and admission, Petitioner refused to cooperate. This, in turn, resulted, ultimately, in the criminal investigation and subsequent Indictment. (R.T. Page 260).

On cross-examination Petitioner's entire Grand Jury transcript was published to the jury panel over the strenuous objections of the defense. As the Prosecution suggested, Petitioner was given the "opportunity" to tell his story to the Grand Jury which ultimately indicted him. The Prosecutor successfully portrayed Petitioner's defense as a mere "re-hash" of positions already rejected by the Grand Jury. The questioning was carefully calculated, and prejudically framed, to destroy Petitioner's presumption of innocence. Utilizing the "prior inconsistent statement" rule for impeachment as a subterfuge, Mr. Wallace deftly published Petitioner's hearsay testimony in a manner

so far-reaching in scope as to substitute the controlled and one-sided evidence of the Grand Jury for Defendant's right to confrontation and cross-examination under the Sixth Amendment to the United States Constitution (R.T. P. 289, 290, 291, and 292).

Ultimately the Prosecutor admitted the statements were not impeachment within the definition of the rule, but the admission came far too late in the proceeding to salvage the presumption of innocence. (R.T. P. 342, 359 and 360).

Both Defendants' Motions for Mistrial, on the above grounds, were overruled. The Court of Appeals, in reviewing the conviction, concedes that the misuse of the Grand Jury testimony was improper but refused to reverse, citing the "harmless error" rule. In doing so, the Fifth Circuit apparently departs from the heretofore universal rule that violation of the confrontation clause, in such a manner, is always "plain error" and mandates reversal.

STATEMENT OF THE CASE

QUESTION 1

CAN THE PROSECUTOR MISREPRESENT THE STANDARD OF INTENT (WILLFULNESS) REQUIRED BY TITLE 26 U.S.C. SECTION 7203 TO THE INDICTING GRAND JURY WITHOUT VIOLATION OF DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION? (UNBIASED GRAND JURY).

As stated previously, Petitioner accepted an opportunity to testify before the Grand Jury extended by the Office of the U.S. Attorney for the Northern District of

Texas. Petitioner appeared before the Grand Jury on May 3, 1983 at Dallas, Texas. Prior to receiving Blauvelt's testimony, the Grand Jury heard from Beatrice Casterline, a Special Agent of the I.R.S. assigned to the "Criminal Investigation" involving Petitioner and his wife.

During the testimony of Casterline, the Prosecutor, R. H. Wallace, placed heavy emphasis on the amount of taxes allegedly owed by Petitioner for the taxable years in question. In discussion between Mr. Wallace and a Grand Juror the following colloquy occurred:

Q. "Even though it's not something that the Government would have to prove, did you, using previous tax returns and whatever information that you could get during your investigation, attempt to figure in any business expenses and deductions to which the Defendants are entitled, to determine whether or not they would have a tax liability? Did they owe any taxes for the years 1978, 1979, and 1980?

A. "Yes, we did. We took their prior year tax returns and came up with a percentage of expenses charged against the gross income. Also when we came across certain expenses they were put in the particular categories. Where what we found was a higher amount we gave that as a business expense. Where we found something, but found giving a percentage of its prior year would be more, we allowed that. So in all cases we allowed the greater expense."

Q. Utilizing whatever business expenses and deductions you've come up with, did you find the Defendants owed a substantial amount of tax for the years '78, '79, and '80?

A. Yes.

Q. *Keep in mind, that's not something the Government has to prove that he owed any tax. General-*

> *ly they are not referred for Prosecution unless there is a substantial amount owed. It also shows willfullness. If a person didn't owe any tax, he might in good faith argue he did not owe any tax and didn't have to file a tax return.".* (See Grand Jury Testimony, Beatrice Casterline, P. 8, L. 15-25; P. 9, L. 1-8 and L. 22-25; and P. 10, L. 1-25.)

The above instruction was clearly wrong. It destroyed Petitioner's presumption of innocence before the Grand Jury and misled its Jurors into believing that a non-filer, with substantial earnings, was more guilty than a party who did not owe any tax. This prejudice was reinforced during Blauvelt's own Grand Jury testimony:

> Q. "A fiduciary doesn't pay the taxes out of his pocket, does he?
> A. Does he file a return?
> Q. My point is, if he doesn't file a return, what personal benefit does he derive from failing to file? He doesn't derive any. And if he doesn't derive any personal benefit, why would he willfully fail to file a return?" (See Grand Jury Testimony of Tony D. Blauvelt, P. 29, L. 17-25).

The above instructions were clearly wrong and misled the Grand Jury. They unfairly focused its attention on the amount of earnings of the Petitioner rather than on his guilt or innocence in failing to file a return for the taxable years in question. In actuality, it is no defense to a Prosecution under Section 7203 that a taxpayer does not owe any tax. Mr. Wallace's instructions to the Grand Jury to the contrary may well have over-emphasized, in their minds, the importance of the alleged fact that Tony D. Blauvelt and K. Janelle Blauvelt owed "a substantial amount" of tax.

If the Grand Jury is to be instructed on a point of law concerning a statute under which they have been asked to Indict a taxpayer, fundamental fairness dictates that they be correctly instructed. The above instructions, when taken as a whole, unfairly prejudiced the interest of the Petitioner and improperly focused the Grand Jury's attention on the "substantial amount" of tax owed rather than the alleged intent of taxpayers *not* to file a return as required by law for the years in question.

The statement of the United States Attorney was simply not true. A person who "didn't owe any tax" could not ". . . in good faith argue that he didn't owe any tax and didn't have to file a tax return." under Title 26 U.S.C. § 7203. By instructing the Grand Jury in such a manner, the Prosecutor may well have raised the inference in their mind that a party or taxpayer who failed to file a tax return and owed "a substantial amount of money" had *no* good faith defense.

One of the fundamental rights of our citizenry, accused of crimes, is to an informed Grand Jury. The U.S. Supreme Court has ruled that a violation of this right may, in certain circumstances, vitiate an entire Indictment. *Wood v. Georgia,* 82 S.Ct. 1364 (1962) is a case which demonstrates this point. In *Wood* a State Grand Jury had received erroneous "special instructions" which were extremely prejudicial to the "independant spirt" required of the Grand Jury. These "special instructions" were a gross violation of the requirement of an "informed" Grand Jury. In fact, they constituted misinformation prejudicial to the prospective Defendants. The instant case reveals a no less egregious campaign of misinformation.

In mischaracterizing the "good faith defense" to the charge of willful failure to file (Title 26 U.S.C., Section

7203), the Prosecution perverted Petitioner's presumption of innocence. The Panel received the impression that "those who make more are more guilty than those who make less". The Prosecutor is not allowed to manipulate the evidence or to improperly instruct the Grand Jury on the law. See *U.S. v. Hogan,* 712 F.2d 757 (C.A. 2, 1983) and *U.S. v. Samango,* 607 F.2d 880 (C.A. 9). Even unintentional factual misstatements are grounds for dismissing an Indictment, for as the Court of Appeals stated in *Hogan*:

> "While the factual misstatements in the agents' testimony may have been inadvertent as the Government now argues, the fact remains that Appellants were prejudiced by the missatement of important facts and the Grand Jury's independent role was impaired.
>
> Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the Grand Jury's role.". See *Hogan* at P. 762. Citing *U.S. v. Asdrubal-Herrera,* 470 F.Supp. 939 (N.D., Illinois, 1979). See also *U.S. v. Donohue,* 574 F.Supp. 1263 (D.C.D. Maryland, 1983). See also *U.S. v. Dibernardo,* 552 F.Supp. 1315 (D.C.S.D., Fla., 1982) and *U.S. v. Chanen,* 549 F.2d 1306 (C.A. 9, 1977).

The true nature and extent of the prosecutorial misconduct in this case, was not revealed until shortly prior to trial when the Grand Jury testimony of Agent Casterline and Petitioner Tony D. Blauvelt, was produced. A short review of this brief testimony will reveal the conduct which resulted in the tainted Indictment.

In *Donohue,* the District Court pondered the effect of prosecutorial misconduct which misled a Grand Jury

prior to return of the Indictment. In attempting to reach an even balance which would insure the integrity of the Grand Jury process, the Court observed:

> "Dismissal of an Indictment is required only in flagrant cases in which the Grand Jury has been overreached *or deceived in some significant way,* as where perjured testimony has knowingly been presented . . .". Citing *Samango* at Page 882.
>
> "We believe, however, that the Grand Jury in this instance was overreached and that a line must be drawn beyond which a Prosecutor's control over a cooperative Grand Jury may not extend. Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other Prosecutorial behavior *even if unintentional, can also cause improper influence and usurpation of the Grand Jury's role.*". Citing *Samango,* at Page 882.

The District Court acknowledged, that under *Samango,* dismissal does not require intentional prosecutorial misconduct. In *U.S. v. Roberts,* 481 F.Supp. 1385 (D.C. C.D., Cal., 1980) the District Court dismissed an Indictment due to prosecutorial misconduct which had misled the Grand Jury and, thereafter, the Court.

> "The Government Prosecutor must always keep in mind that the Grand Jury is, by law and long standing tradition stemming from early English reaction against Star-Chamber Proceedings centuries ago, a shield for every person against an over-reaching, over-zealous, albeit honest and perhaps even well-intentioned, Prosecutor. It is not, and can never be permitted to become, a sword, sharply to be honed by the Courts for any kind of possible attack upon any person, whether wielded by the Prosecutor in good faith or not. *Nor can a Prosecutor, wrecklessly*

> *or even unwittingly, mislead or deceive the Court by promising to disclose all exculpatory evidence brought to the attention of and made available to the Prosecutor and then failing to do so. This is impermissible and beyond the constitutional parameters governing the conduct of the Prosecutor.*". See *Roberts* at Page 1390. Citing *U.S. Attorney's Manual,* Sections 9-11.015 and 9-11.334.

While one challenging an Indictment carries a difficult burden, the Grand Jury's task in determining whether there is probable cause to believe that a crime has been committed must be exercised with "independent judgment" which the Prosecutor may not invade. See *U.S. v. Al Mudarris,* 695 F.2d 1182 (C.A. 9, 1983). The *Mudarris* Panel sharply criticized the prosecutorial misconduct affecting those proceedings and observed:

> "A line must be drawn beyond which a Prosecutor's control over a cooperative Grand Jury may not extend. The 'cumulative effect' of errors and indiscretions, came uncomfortably close to crossing that line here. Prosecutors must stay well back of it in the future. It is only because of the overwhelming evidence of guilt that was presented to the Grand Jury, and our belief that this opinion will have the requisite prophylactic effect, that we affirm.". See *Mudarris* at Page 1188 and 1189.

In the instant case, the Grand Jury was misled on a crucial issue concerning probable cause. Review of the later Grand Jury testimony of Petitioner clearly demonstrates the bias engendered by the Prosecutor's prior comments. Since Petitioner's sole defense was lack of "willfullness" under the Section 7203 Statute the prejudice wrought by the Prosecutor's erroneous instructions effec-

tively destroyed the presumption of innocence. In other words, the Grand Jury was already "pre-conditioned" against the Defendant prior to his testimony based solely on the Government's illegal "instructions". Condemning this practice in *Hogan* the Court of Appeals stated:

> "It is true of course, that Prosecutors, by virtue of their position, have gained such influence over Grand Juries that these bodys' historic independence has been erroded. After all, it is the Prosecutor who draws up the Indictment, calls and examines the Grand Jury witnesses, advises the Grand Jury as to the law, and is in constant attendance during its proceedings. Nonetheless, there remain certain limitations on the presentation a Prosecutor may make to the Grand Jury. *For instance, a Prosecutor may not mislead the Grand Jury or engage in fundamentally unfair tactics before it* . . . due process considerations prohibit the Government from obtaining an Indictment based on known perjured testimony. The Courts have also held that the Prosecutor may not make statements or argue in a manner calculated to inflame the Grand Jury unfairly against an accused.". *Hogan* at Page 759. Citing *U.S. v. Ciambrone,* 601 F.2d 616 (C.A. 2, 1979) and *U.S. v. Serubo,* 604 F.2d 807 (C.A. 3, 1979).

The *Hogan* Court reversed the convictions and remanded the case to the District Court with instructions to dismiss the underlying Indictment explaining, as its rationale, that:

> "While the factual misstatements in the Agent's testimony *may have been inadvertent,* as the Government now argues, the fact remains that the Appellants were prejudiced by the misstatements of important facts and the Grand Jury's independent role was impaired. Citing *Samango* at Page 882.

> Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, *even if unintentional*, can also cause improper influence and usurpation of the Grand Jury's role.". See *U.S. v. Asdrubal-Herrera*, 470 F.Supp. 939 (N.D., Illinois, 1979).

Tony D. Blauvelt was deprived of the "right to Indictment by an unbiased Grand Jury guaranteed by the Fifth Amendment.". *U.S. v. Dibernardo*, 552 F.Supp. 1315 (S.D., Fla., 1982). Also, *Costello v. U.S.*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). Whether the conduct was intentional is irrelevant. This Court should reverse Petitioner's conviction, and dismiss the Indictment, with prejudice, under both the constitutional mandate of the above authorities and its own inherent power of supervisory jurisdiction over the Grand Jury, as an institution of the Federal Courts.

QUESTION 2

CAN THE PROSECUTOR USE PETITIONER'S HEARSAY GRAND JURY TESTIMONY AS EVIDENCE OF GUILT, IN ORDER TO OBTAIN A CONVICTION, WHERE SUCH HEARSAY IS NOT ADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE? [HEARSAY RULE AND RIGHT TO CONFRONTATION AND CROSS-EXAMINATION].

The grounds for Petitioner's Motion for Mistrial, based on the Prosecutor's misuse of Petitioner's Grand Jury Testimony, were explained to the District Court in great detail. Despite the Prosecutor's representations that he would confine his Grand Jury references to matters pertaining to "prior inconsistent statements", the U.S. Attor-

ney renewed his onslaught on the Petitioner's presumption of innocence, substituting, in the jury's mind, the Grand Jury's finding of "probable cause" for the guilt of the Defendant. (R.T. Page 304).

As pointed out in the Brief of Co-Petitioner, K. Janelle Blauvelt, over seventy-five (75) references to the Grand Jury were "skillfully inflicted" by the Prosecutor. The continual repetition of such testimony, coupled with the reading of the Indictment at the instant trial before the jury, effectively shifted the burden of proof from its proper perch, upon the shoulders of the Prosecution, to the Defendant. The most pernicious result possible came to pass. The evidence before the Grand Jury, inadmissible hearsay which lacked the constitutional protections of confrontation, was substituted as evidence-in-chief in Petitioner's trial, resulting in "conviction without confrontation".

The misuse of Petitioner's own Grand Jury testimony is bad enough. Overlooked by the Opinion of the Panel of the Court of Appeals is a far greater evil. The interjection of the Prosecutor's self-serving Grand Jury comments in the record below allowed the Prosecutor to publish testimony without the "sifting balance" of "cross-examination" so essential to a fair trial.

From his initial statement:

> "I sent you a letter advising you that the Grand Jury, Federal Grand Jury was going to be hearing evidence and considering an Indictment as to you and your wife for willful failure to file income tax, did I not?" (R.T. Page 289).

to his closing argument, the Prosecutor so closely intertwined the Grand Jury's finding of "probable cause" with

the evidence at trial, that, in effect, the proper deliberations of the jury were superseded and the proper function of the jury, as a fact finder, usurped.

The Prosecutor conceded that he had gone too far.

> "OK. I am not planning on doing any of those things, getting into the Grand Jury testimony. My purpose is to show prior inconsistent statements under Rule 801, I think under the Rules of Evidence . . ." (R.T. Page 292).

Nowhere throughout the Prosecutor's numerous references to the Petitioner's Grand Jury Indictment and Grand Jury Testimony were any "prior inconsistent statements" brought to light. Recognizing the clear dangers to Petitioner's right to a fair trial, the Prosecutor forged ahead in the face of such constitutional peril and, ultimately, deprived Petitioner of a fair trial. In effect, the Prosecution gambled and the Defendant lost.

The effect of the District Court's Judgment, and the Court of Appeals affirmance, is to punish Petitioner for the above conduct instead of the Prosecution. The case precedent of this Court, and the various Circuit Courts of Appeal have never approved such a curious result. The prejudice is perhaps most aptly demonstrated by the following passage:

> "Mr. Minns: It is quite clear that the Court's Order should have been obeyed on this.
>
> Mr. Wallace: I agree it is not inconsistent. But as long as I am not asking something from that letter I am not impeaching him. Only I want—all I ask—.
>
> Mr. Minns: The Point—.

> Mr. Wallace: But first I am going to show him the letter, let him look at it. Then I will ask him some questions.
>
> Mr. Minns: Those questions are not impeachment.
>
> The Court: No, they are not impeachment.".

(R.T. Page 342). Curiously, the District Court consistently ruled that the Prosecutor's references to Grand Jury testimony were inadmissible under the impeachment exception to the hearsay rule. Notwithstanding these rulings, no effort whatsoever was made, by the bench or the Prosecution, to limit this onslaught on Petitioner's right to a fair trial.

The District Court finally observed:

> ". . . It is not inconsistent to what he told the Grand Jury, he has said he has not told today what he told to the Grand Jury.
>
> I am ruling, I am not going to let the Government go on and ask about it, has already asked him individually and put through these defenses . . ."

(R.T. Page 360). Of course, by this time, it was far too late to cure any error. The hearsay testimony and evidence from the Grand Jury was so "hopelessly intermingled" with proper evidence at trial as to be disseverable even by the learned Justices of this Court. To expect Petitioner's jury to return an unbiased verdict is to engage in a "legal fantasy" of unprecedented proportion.

A criminal Defendant's trial on the merits should not be an "appeal" of a finding of guilty by the Grand Jury. If the wording of the Indictment, indeed, is not proper "evidence" in a federal criminal trial, the hearsay testi-

mony and evidence, allegedly supporting the finding of probable cause, can hardly be elevated to that status. The rule at common law rejects an effort to infect a Defendant's trial with such testimony and evidence fundamentally lacking in the constraints of due process and confrontation imposed by the Fifth and Sixth Amendments to the U.S. Constitution. The ancient rule of common law condemns the present case to reversal and the hearsay rule, still embodied in the Federal Rules of Evidence, requires the same result.

The dangers inherent in allowing Grand Jury testimony to be published to a Jury are substantial. Courts have taken judicial notice of the abundantly clear fact that the Federal Grand Jury is now nothing more than a "tool of the Prosecutor". Searching cross-examination is not allowed. The "right to counsel", still inviolate at the trial resulting from the Indictment, is unknown in the Grand Jury Room.

In this context, Federal Courts have refused to allow the admission of such testimony as "evidence" in a Federal Criminal Trial. Nor has the Government been allowed to "offer previously given statements" as a substitute for a witnesses' testimony under the guise of refreshing the recollection of the witness. As noted by the United States Court of Appeals for the Eighth Circuit in *Goings v. United States*, 377 F.2d 753 (C.A. 8, 1967):

> "Proper foundation requires the witness's recollection to be exhausted, and that the time, place and person to whom the statement was given be identified. When the Court is satisfied that the Memorandum on its face reflects the witness's statement or one the witness acknowledges, and in his discretion the Court is

> further satisfied that it may be of help in refreshing the person's memory, the witness should be allowed to refer to the document. It then becomes proper to have the witness, if it is a fact, to say that his memory is refreshed and, independent of the exhibit, testify to what *his present recollection is. But to read the statement aloud for refreshing recollection to the witness, hostile or not, is patent error.*" (See *Goings* at Page 761).

The prejudice foisted upon the proceedings by this "guise or pretext" is, in no way, cured by the subsequent adoption of the prior statements by the witness. As noted by the Court of Appeals:

> "Appellee urges, however, that the witness Ghost Bear affirmed that the statements were correct and therefore were adopted by the witness. We view this argument with extreme difficulty because of the witness's expressed uncertainty (See Appendix) in responding to questions on both his direct and cross-examination. However, even if the witness adopts the prior statement as true, the error is not cured. It is still a hearsay statement suggested to the witness rather than his own statement given under oath in Court. The procedure utilized cannot be sanctioned to fill in memory gaps of any witness who is called to testify. And as previously demonstrated, this was not evidence contradicting prior testimony of fact and subsequently adopted by the witness.
>
> The right to confront the witness at the time the statements are made is paramount in a criminal trial . . . The fact remains, most ex parte statements reflect the objective interest and attitude of the examiner as well.". (See *Goings* at Pages 761 and 762, and Note 12.)

The wisdom of the above rationale is compelling. Obviously, the "ex parte statements" of Petitioner, prompted

by the examining Government counsel, at the Grand Jury, reflect the Prosecutor's "objective interest and attitude". The problem, in the above case, evident to the Court of Appeals, was to prevent the Prosecution from "offering a previously given statement to substitute for a witness's testimony under the guise of 'refreshing recollection'.". If such Prosecutorial schemes were allowed, reasoned the Court of Appeals, "the whole adversary system of trial must be revised.". The rationale of *Goings* is based on facts remarkably similar to the case at bar. There, as here, the Trial Court clearly indicated it did not consider the witness's (Ghost Bear's) prior statement as impeachment. (See *Goings* at Page 758.) Petitioner suggests that the rationale of *Goings,* alone, mandates reversal in this case. However, the error endemic to these proceedings far surpasses the account of Prosecutorial blunders recounted in the Eighth Circuit decision. Here, Grand Jury testimony, with all of its patent prejudice, infected the trial testimony. *Goings,* on the other hand, involved a prior "hearsay statement" taken from the witness by the Office of the United States Attorney. (See *Goings* at Page 758.)

In *United States v. Block,* 88 F.2d 618 (C.A. 2, 1937) the Second Circuit, speaking through Circuit Justice Learned Hand, reversed the Defendant's conviction, on similar grounds to *Goings* noting:

> "but the situation at bar was very different from anything of the kind. It is true that the witness was plainly lying, but that was just because, instead of affirming the statement, he persistently and unconditionally denied it. There was not the least color for allowing the jury to take it as his testimony on the stand, and the inevitable result was to get before them unsworn evidence in an exceptionally impressive and damaging way. For it was much worse that

> the witness was obviously trying to protect the Defendant; so that when the examination was over, the natural conclusion was not only that the Defendants had kept the still, but that they had suborned the witness to deny it. The Judge's charge mended nothing. He left the jury to disentangle in their mind the innocuous part which the witness had conceded, from the great bulk which he had disaffirmed. The hearsay remained as effective as before, and really the prejudice was incurable anyway, whatever he might have said.". (See *Block* at Page 620.)

The Prosecutor in *Block,* as here, received the Defendant's testimony, at the Grand Jury level. (See *Block* at Page 619.)

The Prosecutor's cross-examination of Mr. Blauvelt "published" prior Grand Jury testimony of the witness, both through the witness's ex parte hearsay statements *and* those of the Prosecutor himself. (See R.T. Page 380 and Page 381) The present case even adds a new dimension! Here, unlike any of the above cases, the Prosecutor's Grand Jury questions were "published" to the Jury Panel as direct evidence. (R.T., Page 383 and Page 384).

Neither Defense counsel had the opportunity to cross-examine R. H. Wallace, the Federal Prosecutor offering the above statements. In fact, he became a "material witness" against the Defense as a result of his own statements, in a manner violating the ethical standards of the American Bar Association. While counsel for Petitioner is certain this ethical misconduct was inadvertent, and unconscious, the effect of such prejudice is clear and mandates reversal.

In fact, many Circuit Courts of Appeal have held, on numerous occasions, that a Prosecutor who is a "material

witness" in a criminal case must withdraw prior to empanelment of a jury and submission of the case. This avoids the "strong implications" of "witness bolstering" attendant to Government "vouching" for the credibility of a witness because he is a member of the very same "Government" which is prosecuting the Petitioner.

As a final consideration, the Prosecutor even "published" the statements of third-parties—i.e. the members of the Grand Jury—in what came to be an all out effort to destroy Petitioner's presumption of innocence. This testimony, when read carefully, clearly elicits incurable prejudice in the minds of the jury. Through it, the Jury was told, in no uncertain terms, that the Grand Jurors had heard the Petitioner's defenses and ". . . didn't want to hear anymore . . .". (See R.T. Page 385). Again, the impossibility of curing such prejudice is evident. Petitioner's counsel could not cross-examine the absent Grand Jurors. There was simply no way to blunt the Prosecution's insinuation that Petitioner's defenses were insubstantial and that he had been found "guilty" by the Grand Jury after a fair trial.

Numerous objections were voiced throughout the above proceedings by counsel for both Defendants. Though futile, they placed the District Court, and the Prosecution, on fair notice of the harm and prejudice which could not be cured.

The potential for prejudice is so high that the Courts are reluctant to allow utilization of Grand Jury testimony, in any regard.

The same Court of Appeals which affirmed the convictions below refused to allow a Defendant's husband to publish his own self-serving Grand Jury testimony to the

jury, relying, perforce, on the same principles which preclude the prosecutorial "Grand Jury tactics" demonstrated in the record of this case. See *U.S. v. Anderson*, 577 F.2d 258 (C.A. 5, 1978).

The decision below is troublesome because, in affirming the convictions, under the "harmless error" theory, the U.S. Court of Appeals for the Fifth Circuit has, in effect, established a "double standard" in the use of Grand Jury testimony and evidence. The decision below allows the Prosecutor the latitude to inject his own self-serving Grand Jury testimony or evidence into the record of the trial, for maximum prejudicial effect, and dubs such tactics "harmless error" while precluding use of the same testimony, and evidence, by the defense. Such an inconsistent standard of judicial favoritism violates not only the mandates of due process, and confrontation, but also, equal protection of the law. Only when a witness testifies to a fact before the Grand Jury and, subsequently, testifies contrary to that fact, will such testimony be used. As noted by the United States Court of Appeals for the District of Columbia:

> "It is seen from the foregoing that an attempt was first made to have the witness refresh his recollection by silently reading a part of his Grand Jury Testimony. We think this was not error. The difficulty comes from what followed. The witness adhered to his testimony. Unsatisfied, Government counsel was permitted to read aloud much more of Lawrenz's Grand Jury testimony. This was not refreshing the witness's recollection. It was placing before the trial jury testimony previously given before a Grand Jury when there had been no cross-examination and Defendant was not confronted with the witnesses against him. (See Amendment 6, United States Constitution).

> . . . the fact that the witness was on the stand and subject to cross-examination does not supply the omission of confrontation and cross-examination at the time the Grand Jury testimony itself, later read to the trial jury, was given.". See *3 Wigmore,* Evidence, Section 1018 (3d ed.); *Young v. United States,* 214 F.2d 232 (C.A.D.C., 1954) at Page 237 and 239.

The Federal Courts have condemned "conviction by hearsay" for over 100 years. The rules outlined above are sound *and* should be adhered to by this Court. See also *Rosenthal v. United States,* 248 F. 684 (C.A. 8, 1918). Indeed, this Court has previously joined the Courts of Appeals in rejecting the misuse of hearsay testimony to obtain a conviction. As stated by the Court:

> "There is always error where under the pretext of refreshing a witness's recollection the prior testimony is introduced as evidence.". See *United States v. Socony-Vacuum Oil Company,* 60 S.Ct. 811, 310 U.S. 150 (1940) at Page 849.

This doctrine holds true where such testimony is introduced, directly or indirectly. Under *Socony,* hearsay testimony may not be used to provide "essential ingredients of the crime" such as "willfulness" here. See *Socony* at Page 850. Citing *Little v. U.S.,* 93 F.2d 401 (C.A. 8).

The use of Grand Jury testimony and evidence must always be properly confined within the narrow parameters of exceptions to the Hearsay Rule. The reason for this is to guarantee that a Defendant will be convicted, if at all, only on sworn testimony before the jury sacredly charged with the duty, under our Constitution, to return a verdict of guilt or innocence.

> "Lawrenz's Grand Jury testimony could not be added to that given on the trial consistently with the necessity of trying the accused on the evidence, not before the Grand Jury which indicted him, but before the jury trying him on the Indictment.". See *Young* at Page 238.

In accord with *Young,* supra, the various Circuit Courts of Appeal and this Court, have safeguarded the Defendants from prosecutorial abuse of Grand Jury evidence and testimony for over a century. This consistent pattern of constitutional safeguards is disturbed only by the judicial anomaly of the opinion below. The *Young* decision is alive and well in the Circuit of its birth and was reaffirmed as recently as *U.S. v. Kim,* 595 F.2d 755 (C.A.D.C., 1979).

Unlike the Fifth Circuit here, a panel of the Circuit Court of Appeals for the District of Columbia, including the Chief Justice of this Court, found plain error in the introduction of hearsay Grand Jury evidence and testimony under Rule 52(b) of the Federal Rules of Criminal Procedure. See *Bartley v. U.S.,* 319 F.2d 717 (C.A.D.C., 1963). Under *Bartley,* and other progeny spawned by *Young,* neither the Prosecution nor the Defendant can utilize such hearsay in a criminal trial, a fair and even-handed result. See also *U.S. v. Gilliam,* 484 F.2d 1093 (C.A.D.C., 1973).

Error of constitutional magnitude infects the entire proceedings below. Petitioner was convicted on evidence violative of his rights to confrontation and due process. The Judgment of conviction below should be reversed and the cause remanded.

REASONS FOR ALLOWANCE OF THE WRIT

1. Petitioner was denied his right to an unbiased Grand Jury under the Fifth Amendment to the U.S. Constitution and the dictates of due process.

2. The panel decision of the Fifth Circuit Court of Appeals below squarely conflicts with this Court's holdings in *Wood v. Georgia,* 82 S.Ct. 1364 (1962) and *Costello v. U.S.,* 350 U.S. 359 76 S.Ct. 406, 100 L.Ed. 397 (1956) mandating review by this Court to prevent an unwarranted expansion of such conflict in the Circuits.

3. Petitioner was denied his rights to confrontation and equal protection of the law through misuse by the Prosecutor of hearsay Grand Jury testimony and evidence to obtain a conviction.

4. The panel decision of the Fifth Circuit Court of Appeals conflicts with this Court's opinion in *U.S. v. Socony-Vacuum Oil Company,* 60 S.Ct. 811, 310 U.S. 150 (1940) and decisions of other Circuit Courts of Appeal. Review of the Panel's decision is necessary to insure uniformity of precedent in the Circuits.

CONCLUSION

For all of the above reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Joe Alfred Izen, Jr., do hereby certify that a true and correct copy of this Brief has been forwarded to the following parties on this the 22nd day of February, 1985:

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JOE ALFRED IZEN, JR.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TONY D. BLAUVELT and K. JANELLE BLAUVELT,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Texas

(November 30, 1984)

Before GEE, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:*

Tony D. Blauvelt and his wife, K. Janelle Blauvelt, were convicted after a trial by jury, on six counts of an indictment charging each of them with failing to file income tax returns in violation of 26 U.S.C. § 7203. They

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

appeal their conviction, asserting that the record contains insufficient evidence to sustain a determination that they willfully failed to file income tax returns for the years 1978, 1979 and 1980; that their conviction should be reversed because of judicial bias and prosecutorial misconduct; and that a new trial is required on the grounds of jury misconduct. Mrs. Blauvelt separately argues that the terms of the probation are unduly harsh since compliance with them is impossible. We reject all of the appellants contentions, and affirm the convictions of both defendants.

I.

Appellants Tony D. Blauvelt (Tony) and K. Janelle Blauvelt (Janelle) were married and living together during all three tax years involved in this case. Tony was employed as a sales representative for a company that manufactured wedding albums. He was well educated in the professional and business world, holding a college degree in engineering, as well as a real estate broker's license and an employment agency license. Additionally, Tony had taken a course on individual preparation of federal income tax returns. He had prepared his 1975 and 1976 income tax returns. Janelle was employed by a construction company as a secretary. Her duties included some basic bookkeeping, such as accounts receivables and accounts payable. Janelle also prepared the payroll checks for the company, deducting F.I.C.A. and federal withholding tax from employees' checks. Janelle had attended college, although she did not have a degree. The government introduced evidence that indicated that Tony's and Janelle's combined gross income totalled: for the year 1978, $70,664.96; for the year 1979, $101,722.72; and for the year 1980, $119,654.79. In accordance

with the community property laws of the State of Texas, each spouse is required to report as taxable income one-half of the earnings of the other spouse. Therefore, whether separate or joint returns were filed, both Tony and Janelle had sufficient income to require each of them to file a federal individual income tax return.

II.

The essential elements of a violation of 26 U.S.C. § 7203 are that a taxpayer have sufficient income to require the filing of an income tax return and that he *willfully* fail to do so. This court has defined "willfully" in connection with this statute as a voluntary, intentional violation of a legal duty. *United States v. McCarty*, 665 F.2d 596 (5th Cir. 1982); *United States v. Wilson*, 550 F.2d 259 (5th Cir. 1977). The appellants' first argument on appeal is that the record contains insufficient evidence to establish that they willfully failed to file their federal income tax returns.

Tony argues that the only evidence introduced against him was circumstantial, and that this evidence is insufficient to establish the requisite intent element under the statute. He argues that the evidence merely establishes that he had sufficient income to file a return for the years 1978, 1979 and 1980, that he did not file a return for those years, and that he had previously filed income tax returns, but that it does not prove that he had the specific intent to violate the statute. Tony also claims that he did not file his return because it was so complex that he could not correctly complete it and he believed that if he filed an erroneous return he would commit a felony.

The jury rejected Tony's arguments and we do also. We find that the record contains sufficient evidence to

support the jury's finding that he willfuly failed to file his federal income tax returns. Tony was well educated, had extensive experience in the business world, was aware of the graduated tax system, and had previously prepared and filed his income tax returns. He had also taken a course to assist in the preparation of income tax returns. The jury could have easily and quickly inferred from this evidence that Tony voluntarily and intentionally violated a known legal duty.

Although the evidence against Janelle is not as overwhelming, we find that the record contains sufficient evidence to support the jury's finding of guilt. Janelle was not an uneducated woman; she had business experience, and had previously filed individual income tax returns. She worked as a bookkeeper and her duties included preparing payroll checks. Janelle did not testify at trial, but according to her husband's testimony, she was not provided with any information regarding his earnings. Under Texas' community property law, Janelle is required to report one-half of Tony's earnings as her taxable income.

Janelle's lack of access to the financial data, even if the jury believed it, does not compel an acquittal. The evidence shows no effort to obtain the information from her husband, or even a request of him for the information over a three-year period. She sought no advice from any source as to how, under these circumstances, a partial or incomplete tax return could be filed. Rather, she simply did not file any return during 1978, 1979 and 1980. The jury could have concluded that Janelle's total lack of effort to file any tax returns over a three-year period, considering her background and knowledge, constituted a voluntary and intentional violation of a legal duty. The record therefore supports the jury's finding that Janelle willfully failed to file her federal income tax return.

The appellants next argue that the decision of the district court should be reversed because of judicial bias and prosecutorial misconduct. The appellants argue that the trial judge gave the appearance of supporting the government's position to their prejudice, and allowed the prosecution to "brow beat" the witnesses. "An appellate court should be slow to reverse a case for the alleged misconduct of the trial court unless it appears that the conduct complained of was intended or calculated to disparage [a party] in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits." *La Barge Water Well Supply Co. v. United States*, 325 F.2d 798 (8th Cir. 1963); *White v. Chicago, Burlington and Quincy Railroad*, 417 F.2d 941 (8th Cir. 1969). After reviewing the record, we are unconvinced that the trial court was biased, or that the appellants suffered any injury from the conduct of the trial court.

The appellants claim the prosecutorial misconduct occurred because of the continual reference, especially in the cross-examination of Tony, to the grand jury proceedings. Even if, as the Blauvelts argue, the prosecutor misused the grand jury testimony of Tony, our review of the record convinces us, given the evidence of guilt, that the persistent use of the grand jury testimony did not affect the appellant's substantial rights. Because the prejudicial effect, if any, of the cross-examination was slight in relation to the overwhelming evidence of guilt, any impropriety was harmless beyond a reasonable doubt. *United States v. Willis*, 599 F.2d 684 (5th Cir. 1979).

The Blauvelts' third argument is that the trial court should have granted a new trial because of jury misconduct. The evidence of the alleged misconduct is that when Tony contacted the jury foreman without authorization, the foreman stated that Tony and Janelle were convicted

because they had sufficient income, yet failed to file an income tax return. The Blauvelts argue that this statement indicated that the jury failed to consider whether they had the specific intent not to file the return. Once again, we reject appellants argument. At the hearing on the appellants' motion for a new trial on this issue, the court questioned every juror whom the appellants subpoenaed to the hearing as to whether they followed the court's instructions. Each juror responded affirmatively. We find that the jurors' response to these questions adequately proves that the jury considered the court's instruction, and that any further inquiry into the thought processes of the jurors would be merely harassment under the facts of this case.

Finally, Janelle argues that the term of her probation which requires her to settle all tax claims with the Internal Revenue Service is not a proper condition. We disagree. It is clear that under 18 U.S.C. § 3651, the district court has an exceptional degree of flexibility in which to enact reasonable conditions upon probation. *Burns v. United States,* 287 U.S. 216, 53 S.Ct. 154 (1932). Such conditions are reviewable only upon an abuse of discretion. *United States v. McCleod,* 608 F.2d 1076 (5th Cir. 1979). In reviewing the record, we find no abuse in conditioning probation upon settling all tax claims with the Internal Revenue Service. *See United States v. Merritt,* 639 F.2d 254 (5th Cir. 1981).

We have also considered the appellants' remaining assertions of error, but find that these contentions lack merit. Our review of the record indicates that there is sufficient evidence to sustain the convictions, and that there has been no error requiring a new trial. Accordingly, the district court is

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TONY D. BLAUVELT and
K. JANELLE BLAUVELT,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

(Opinion 11/30/84, 5 Cir., 198__, ___F.2d___)

(January 24, 1985)

Before GEE, WILLIAMS, and JOLLY, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

* * *

ENTERED FOR THE COURT:

/s/ E. GRADY JOLLY
United States Circuit Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DOCKET NO. CR4-83-97

UNITED STATES OF AMERICA,

v.

TONY D. BLAUVELT

(Filed January 27, 1984)

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date January 27, 1984 with counsel Joe A. Isen, Jr., (Retd.), pleading not guilty.

There being a finding of guilty.

Defendant has been convicted as charged of the offense of failure to File Tax Return, in violation of Title 26, U.S.C. § 7203.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficent cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year on Count 1 and one (1) year on Count (3), said sentences to run concurrently.

IT IS ORDERED that the defendant is herby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and assessed a fine of Twenty Five Hundred ($2,500.00) on Count 5. Execution of the sentence of imprisonment only is suspended and defendant placed on probation for a period of five (5) years. Sentence of imprisonment hereby imposed in Count 5 is to run consecutively to the sentences imposed in Counts 1 and 3. A special condition of probation is that the defendant settle all tax problems with the Internal Revenue Service.

Defendant shall report to the U.S. Marshal's Office, Fort Worth, Texas, on February 16, 1984 at 2:00 p.m. to commence serving said sentence.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ ELDON B. MAHON
Eldon B. Mahon
U. S. District Judge

Dated: January 27, 1984.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal No. 84-1139

TONY D. BLAUVELT, ET AL,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI

To The Honorable Circuit Justices or Clerk of said Court:

COMES NOW, Tony D. Blauvelt, Appellant, by and through his attorney of record, Joe Alfred Izen, Jr., and files this his Motion to Stay the Issuance of Mandate in this cause pending Application for Writ of Certiorari to the United States Supreme Court and, in support of said Motion, would respectfully show the Court the following:

1. Previously, the original Panel of this Court entered an Order denying the Petition for Re-hearing of Tony D. Blauvelt in this case on January 24, 1985.

2. Mandate is therefore set to issue in this cause within seven days of the date of said Order (i.e. January 31, 1985).

3. Appellant Tony D. Blauvelt has proceeded with his appeal in good faith. The appeal was argued before a

Panel of this Court of Appeals at oral argument and the Panel of this Court found what it termed to be "harmless error" in the use of hearsay Grand Jury testimony by the Prosecutor.

4. As indicated in Appellant's Petition for Re-hearing and Suggestion for Re-hearing En Banc the misuse of Grand Jury testimony by the Prosecutor below constitutes a legal issue about which there is substantial doubt; and, therefore, a meritorious ground exists for appeal of the conviction to the United States Supreme Court. See *U.S. v. Anderson,* 577 F.2d 258 (C.A. 5, 1978) and *U.S. v. Sacony-Vacuum Oil Company,* 60 S.Ct. 811 (1940).

5. Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, Appellant prays that this Court grant a stay of mandate in this cause pending his Application to the Supreme Court of the United States for a Writ of Certiorari. Appellant requests a stay of thirty days from the date of the entry of this Court so that he may file his Application for Writ of Certiorari with the Clerk of the Supreme Court.

6. Appellant further requests that this Court order, that upon the filing of such Application for Writ of Certiorari with the Clerk of the Supreme Court within the thirty day period, this Court's stay of mandate will continue until final disposition of the Application by the Supreme Court.

7. Appellant is presently on bond, on his own personal recognizance and has at all times complied with all conditions set by the District Court in this Court of Appeals.

WHEREFORE, ABOVE PREMISES CONSIDERED, Appellant, Tony D. Blauvelt, prays that this Honorable

Court entertain this Motion and, after due consideration of same, that this Court enter an Order granting Appellant a stay of the mandate in this cause for an additional period of thirty days, and directing that the stay of mandate will continue if within the thirty days Appellant timely files his Application for Writ of Certiorari with the Clerk of the Supreme Court of the United States, until final disposition of the Application by the Supreme Court. Appellant prays for general relief.

Respectfully submitted,

/s/ JOE ALFRED IZEN, JR.
Joe Alfred Izen, Jr.
Attorney for Appellant
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Houston, Texas 77074
(713) 776-0850

CERTIFICATE OF SERVICE

I, Joe Alfred Izen, Jr., certify that a true and correct copy of the above was sent to R. H. Wallace, Assistant U.S. Attorney, U.S. Courthouse, Fort Worth, Texas 76102 by United States mail, postage prepaid on this the 29th day of January, 1985.

/s/ JOE ALFRED IZEN, JR.
Joe Alfred Izen, Jr.

Office-Supreme Court, U.S.
FILED
MAY 25 1985
ALEXANDER L. STEVAS,
CLERK

Nos. 84-1332 and 84-1352

In the Supreme Court of the United States

OCTOBER TERM, 1984

K. JANELLE BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

TONY D. BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12-18

QUESTIONS PRESENTED

Both petitions present the following question:

1. Whether the government improperly used petitioner Tony Blauvelt's grand jury testimony to impeach his testimony at trial.

The petition in No. 84-1332 presents the following additional question:

2. Whether the evidence is sufficient to support petitioner's conviction for wilfully failing to file a federal income tax return, in violation of 26 U.S.C. 7203.

The petition in No. 84-1352 presents the following additional question:

3. Whether the grand jury was properly instructed regarding the element of wilfulness for the offense of wilfully failing to file an income tax return, 26 U.S.C. 7203.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1332

K. JANELLE BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1352

TONY D. BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (84-1332 Pet. App. 1a-6a)[1] is unreported.

JURISDICTION

The judgment of the court of appeals in both cases, which were consolidated in that court, was entered on November 30, 1984. A petition for rehearing in both cases was denied

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[1]Hereafter, "Pet. App." will refer to the appendix to the petition in No. 84-1332 unless otherwise noted.

on January 24, 1985 (Pet. App. 7a; 84-1352 Pet. App. 7a). The petition for a writ of certiorari in No. 84-1332 was filed on February 20, 1985. The petition for a writ of certiorari in No. 84-1352 was filed on February 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners Janelle Blauvelt and Tony Blauvelt were convicted on three counts of wilfully failing to file income tax returns for the years 1978, 1979, and 1980, in violation of 26 U.S.C. 7203. Petitioner Janelle Blauvelt was sentenced to 30-days' confinement at a half-way house, was fined $1,500, and was placed on probation for a period of four years to begin upon her release from confinement. Petitioner Tony Blauvelt was sentenced to a one-year term of imprisonment was fined $2,500, and was placed on probation for a period of five years to begin upon his release from confinement. The court of appeals affirmed (Pet. App. 1a-6a).

1. a. Petitioners are husband and wife, and they lived together for the years 1978-1980 (Pet. App. 2a; Tr. 63-64, 313-314). During that period, both were gainfully employed, and each realized sufficient income to require the filing of federal income tax returns (GX 24, 26, 28, 30-38, 40, 42, 44, 55; Tr. 65-68, 81, 89-91, 194-201, 232-233, 294).[2] However,

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[2]Petitioners' combined gross income for the years in question was as follows (Pet. App. 2a; GX 55; Tr. 194-200):

1978:	$70,664.96
1979:	$101,722.72
1980:	$119,654.79

Given the community property laws of Texas, where petitioners lived during this period (Tr. 320), each petitioner was required by federal law to report as taxable income one-half of this combined gross income (Pet. App. 2a-3a).

neither petitioner filed a separate or a joint federal income tax return for those three years (GX 1-3; Tr. 108, 112-113; 301).

The evidence adduced at trial showed that petitioners' failure to file these returns was wilful. Internal Revenue Service records proved that petitioners had filed joint returns (Form 1040) in 1974, 1975, and 1976 (GX 20-22; Tr. 103-107, 116, 233).[3] Petitioner Tony Blauvelt is a sales representative, holds a bachelor's degree in chemical engineering, and has pursued postgraduate studies in law, taxation, and other areas (Pet. App. 2a; Tr. 257, 307-308). He had taken a college-level course on the preparation of federal income tax returns and knew from that course that the federal income tax laws required him to file a return for the years in question (Pet. App. 2a; Tr. 167, 174, 242-243, 257, 301-302, 314).[4] Petitioner Janelle Blauvelt had attended college (but did not receive a degree) and was employed as a secretary for a construction company, but had experience in bookkeeping, which she performed for her employer (Pet. App. 2a; Tr. 125-126, 130-132, 315). In that capacity, among other things, she was responsible for calculating and deducting F.I.C.A. and federal withholding tax from employees' paychecks (Pet. App. 2a; Tr. 125-126, 130-132).

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[3]Petitioners' returns for those years reflected the following amounts of adjusted gross income (Tr. 103-107):

1974: $14,583

1975: $12,562

1976: $20,557

However, petitioner Tony Blauvelt filed his 1975 and 1976 returns only after being ordered by the United States District Court for the Northern District of Texas to comply with an IRS administrative summons requesting him to produce various documents relating to those tax years (GX 46-48; Tr. 138-157, 238).

[4]Petitioner Tony Blauvelt also holds a real estate broker's license and an employment agency license (Tr. 310-313).

b. Prior to trial, petitioner Tony Blauvelt voluntarily testified before the grand jury. In that testimony, he claimed that he was entitled to be absolved from all liability for failing to file income tax returns for the years in question on the ground that the IRS has historically declined to prosecute executors and trustees for their failure to submit required tax returns (5/3/83 Tr. (Tony Blauvelt) 12-35; see also Tr. 381-386). Tony Blauvelt also testified at trial. This time, however, he claimed that he had failed to file the returns because of his fear that, had he done so, he might incriminate himself (Tr. 279-282, 303-304, 306, 327-328, 335). In this regard, he stated that his fear was based upon a warning that he had received from an IRS official at the time that he filed his 1976 return (Tr. 248-249, 318, 327-328; see Pet. App. 3a; see also page 3 note 3, *supra*), and he also maintained that the tax return forms were too complex for him to complete without doing so erroneously and unlawfully (Pet. App. 3a; Tr. 236, 238, 307-312).

On cross-examination, the prosecutor, in order to impeach petitioner's testimony, brought out the fact that petitioner did not rely upon that excuse for his failure to file a return when he voluntarily testified before the grand jury (Tr. 304, 351-352, 354-357, 381-386). The government pursued this line of inquiry to show that petitioner's trial testimony was a recent fabrication (Tr. 428).

2. The court of appeals affirmed the convictions of both petitioners in an unpublished opinion (Pet. App. 1a-6a). The court found (*id.* at 3a-4a) that, given petitioners' education, business experience, and history of filing prior federal income tax returns, there was sufficient evidence to allow the jury to find that petitioners had wilfully failed to file a federal income tax return for the years in question. Moreover, the court held (*id.* at 5a) that any misuse by the government of petitioner Tony Blauvelt's grand jury testimony to impeach his testimony at trial was harmless

beyond a reasonable doubt, assuming that any error occurred at all. The court also rejected without discussion (*id.* at 6a) petitioners' claim that the government had misled the grand jury regarding the proper meaning of the term "wilful" for purposes of 26 U.S.C. 7203.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Both petitioners contend (84-1332 Pet. 3-22, 29-30; 84-1352 Pet. 14-26) that the government violated their Confrontation and Due Process Clause rights by using petitioner Tony Blauvelt's grand jury testimony to impeach his testimony at trial. That claim lacks merit.[5]

Contrary to petitioner's repeated assertions, the government did not improperly introduce prejudicial evidence before the jury. Rather, the government merely elicited from petitioner the fact that he had voluntarily testified before the grand jury and had been afforded a full opportunity to explain his failure to file the required tax returns, but had omitted from his grand jury testimony the excuse

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[5]Petitioner Janelle Blauvelt erroneously asserts (84-1332 Pet. 3-22) that her rights were violated by the government's use of her husband's grand jury testimony to impeach his trial testimony. Both at the time of the impeachment (Tr. 372-373) and at the close of the evidence (Tr. 484-485; see also Tr. 482), the district court instructed the jury that it could consider this evidence only in connection with her husband and not as proof of her guilt. Moreover, because her husband's grand jury testimony was not hearsay (see Fed. R. Evid. 801(d)(1)(A) (prior, sworn inconsistent statement)), and because he was available for cross-examination regarding his statements, admission of that testimony did not violate her rights under the Confrontation Clause. See *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 5; *California* v. *Green*, 399 U.S. 149 (1970).

for his nonfeasance that he offered at trial (see page 4, *supra*). This line of questioning was an entirely proper effort to show that petitioner's trial testimony was a recent fabrication. See *Anderson* v. *Charles*, 447 U.S. 404 (1980). Nor was that evidence hearsay. Petitioner's own statements (Tr. 386) were admissible either as admissions (Fed. R. Evid. 801(d)(2)(A)) or as prior, sworn inconsistent statements (Fed. R. Evid. 801(d)(1)(A)). The statements of the prosecutor and the grand jurors (Tr. 377, 386) were not hearsay because they were offered simply to show that petitioner had been advised of his rights, not to prove the truth of the matters asserted therein. See Fed. R. Evid. 801(c); *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 4; *Anderson* v. *United States*, 417 U.S. 211, 219-220 (1974).[6]

2. Petitioner Janelle Blauvelt contends (84-1332 Pet. 22-29) that the evidence is insufficient to support her convictions for wilfully failing to file a federal income tax return. She does not deny that she failed to file a tax return for the years in question; rather, her claim is that the evidence does not support the jury's finding that her failure to do so was wilful. However, both the district court (Tr. 226, 405-406) and the court of appeals (Pet. App. 4a) found that the evidence was sufficient to support petitioner's convictions. Given these concurrent factual findings by both lower courts, review by this Court of petitioner's fact-bound claim is unwarranted. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[7]

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[6]For that reason, petitioner Tony Blauvelt's Confrontation Clause claim must also fail. See *Tennessee* v. *Street*, slip op. 5; *Dutton* v. *Evans*, 400 U.S. 74, 88 (1970) (plurality opinion).

[7]In any event, as the court of appeals explained (Pet. App. 4a), the government adduced sufficient circumstantial evidence to support the finding that she wilfully failed to file the returns in question (pages 2-3,

3. Petitioner Tony Blauvelt maintains (84-1352 Pet. 6-14) that the prosecutor misled the grand jury regarding the correct meaning of the term "wilful" for purposes of 26 U.S.C. 7203. That claim also lacks merit.

Petitioner relies upon one statement made by the prosecutor to the grand jury during the testimony of an IRS agent in which the prosecutor commented upon the elements of 26 U.S.C. 7203[8] as the basis for his claim (84-1352 Pet. 8) that the government "destroyed [his] presumption of innocence" and misled the grand jurors "into believing that a non-filer, with substantial earnings, was more guilty than a party who did not owe any tax." However, petitioner has mischaracterized the prosecutor's statement. That statement does not suggest that petitioner should be indicted simply because he owed a substantial amount of tax. At most, the remark simply suggests that the existence of a substantial tax liability is probative evidence of wilfulness, and that is a correct statement of the law. See, *e.g., United States* v. *Garguilo,* 554 F.2d 59, 62 (2d Cir. 1977); *United States* v. *Walker,* 479 F.2d 407, 409 (9th Cir. 1973); *Lumetta* v. *United States,*

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supra). See *United States* v. *Garguilo,* 554 F.2d 59, 62 (2d Cir. 1977). Petitioner's defense was that she lacked access to information regarding her husband's income (Pet. App. 4a; 84-1332 Pet. 24-29). However, the only evidence supporting that defense was the trial testimony of her husband (Pet. App. 4a; Tr. 287), whom the jury was entitled to disbelieve. See *United States* v. *Bailey,* 444 U.S. 394, 414-415; *Hoffa* v. *United States,* 385 U.S. 293, 311 (1966). Petitioner also made no effort during that period to obtain the necessary information from her husband or to seek advice as to whether and how to file a partial return. Pet. App. 4a; Tr. 282-283.

[8]The statement is as follows (5/3/83 Tr. (Beatrice Casterline) 10-11):

> Keep in mind, that's not something the government has to prove. We don't have to prove that he owed any tax. Generally they're not referred for prosecution unless there's a substantial amount owed. It also shows willfulness. If a person didn't owe any tax, he might in good faith argue that he didn't owe any tax and didn't have to file a tax return.

362 F.2d 644, 645-646 (8th Cir. 1966). Furthermore, the prosecutor instructed the grand jury at other points during the proceedings that, to prove an offense under 26 U.S.C. 7203, the government was required to show that petitioners were required to file a tax return, that they failed to do so, and that their failure was wilful (5/3/83 Tr. (Beatrice Casterline) 2-3; 5/3/83 Tr. (Tony Blauvelt) 6, 11). Accordingly, because the grand jury was correctly informed as to the elements of the offense of wilfully failing to file a federal income tax return, the district court properly denied petitioner's motion to dismiss the indictment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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